

BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

\* \* \* \* \*

POPLAR ELEMENTARY DISTRICT	)	
NO. 9, BY AND THROUGH ITS	)	
BOARD OF TRUSTEES,	)	OSPI 237-94
	)	
Respondent/Appellant,	)	
	)	<u>DECISION AND ORDER</u>
vs.	)	
	)	
JEFF BERG,	)	
	)	
Petitioner/Appellant.	)	

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PROCEDURAL HISTORY OF THIS APPEAL

Jeff and Debbie Berg live on a farm northeast of Wolf Point in Poplar Elementary School District No. 9. Their children, Nicole and Trenton, have attended Frontier Elementary School District No. 3 in Wolf Point since kindergarten. On June 6, 1993, Debbie Berg completed an attendance agreement requesting that Poplar District pay tuition for her children to continue attending school in the Frontier District during the 1993-1994 school year. The board of trustees of the Frontier District approved the attendance agreement and forwarded it to the Poplar District on or about June 22, 1993. Jeff Berg received a letter dated October 13, 1993 from Poplar District Superintendent Sullivan telling him that the Poplar Board of

Trustees had denied his request for out-of-district tuition to the Frontier School District for the 1993-1994 school year. Jeff Berg appealed the denial of the out-of-district tuition by the Poplar Board of Trustees to the Roosevelt County Superintendent of Schools on November 26, 1993. Roosevelt County Superintendent Traci Harada appointed Jean Grow, Dawson County Superintendent of Schools, to hear the appeal. The hearing was held on February 2, 1994. The County Superintendent issued her FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER on April 20, 1994. The County Superintendent reversed the decision of the Poplar Board of Trustees and ordered the District to pay the out-of-district tuition for Nicole and Trenton Berg because the "disapproval of the Berg attendance agreement was not timely."

Poplar Elementary District No. 9 appealed the FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER of the County Superintendent to the State Superintendent on May 13, 1994. The State Superintendent issued a Notice of Appeal and established a briefing schedule on May 18, 1994. The District filed its brief on June 20, 1994. Jeff Berg declined to file a response brief. The State Superintendent deemed the matter submitted on November 14, 1994. Having reviewed the record and the brief submitted by the Poplar School District, this State Superintendent now issues the following:

## ORDER

The County Superintendent's ORDER requiring the Poplar Elementary School District to pay 1993-1994 tuition to the Frontier Elementary District for Nicole and Trenton Berg is affected by error of law and is hereby reversed. The decision of the Trustees denying Jeff Berg's request for out-of-district tuition is affirmed. The County Superintendent erred in construing Section 20-5-322, MCA.

## STANDARD OF REVIEW

The State Superintendent applies the standard of review of administrative decisions established by the Montana Legislature in § 2-4-704, MCA, and adopted by this Superintendent in 10.6.125, ARM. The petitioner bears the burden of showing that he has been prejudiced by a clearly erroneous ruling. Terry v. Board of Regents, 220 Mont. 214, at 217, 714 P.2d 151, at 153 (1986). Findings of fact are reviewed under a clearly erroneous standard. Harris v. Trustees, Cascade County and Nancy Keenan, 241 Mont. 272, 731 P.2d 1318 (1990). Conclusions of law are subject to more stringent review. Conclusions of law are reviewed to determine if the agency's interpretation of the law is correct. Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, at 474, 803 P.2d at 603 (1990).

## DISCUSSION

Debbie Berg completed a tuition agreement requesting tuition for her children to attend the Frontier School District

on June 6, 1993. (FF#7.) Frontier approved the agreement on June 21, 1993. (FF#8.) The Frontier School secretary sent the agreement to the Poplar District on June 22 or 23, 1993. (FF#9.) The Poplar Board of Trustees denied the agreement on October 11, 1993. (FF#10.)

Jeff Berg argued that road conditions between the Berg residence and the Poplar School District required the Trustees to approve his request for tuition to send the children to the Frontier Elementary District. The County Superintendent concluded that the Berg children did not meet any of the conditions for mandating tuition in § 20-5-321, MCA, which would have required the Poplar District to approve the tuition agreement. Therefore, the Board of Trustees had the discretion to approve or deny the Bergs' request for tuition under the provisions of § 20-5-320, MCA.

On appeal to the County Superintendent, Mr. Berg had the burden of proving that Poplar's denial of his request for out-of-district tuition was an abuse of the Board's discretion. Establishing that the Trustees exercised their discretion contrary to the wishes of the petitioner is not enough. One way of showing abuse of discretion would have been to show that the trustees approved some tuition agreements when a parent was employed in another district, but denied the Bergs' request which was made for a similar reason.

This is the first time the State Superintendent has construed § 20-5-322, MCA, effective July 1, 1993. A basic rule of statutory construction requires giving meaning to all the words of the statute. Section 20-5-322(4) and(5) state:

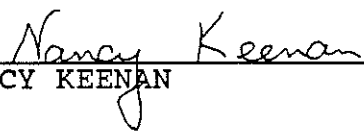
(4) Within 15 days of receipt of an approved out-of-district attendance agreement, the trustees of the district of residence shall approve or disapprove the agreement under the provisions of this part and forward the completed agreement to the county superintendent of schools of the county of residence, the trustees of the district of choice and the parent or guardian.

(5) If an out-of-district attendance agreement is disapproved or no action is taken, the parent may appeal the disapproval or lack of action to the county superintendent and, subsequently, to the superintendent of public instruction under the provisions for the appeal of controversies in this title.

Under the provisions of § 20-5-322(5), MCA, the Bergs' right to appeal the Poplar Board of Trustees' failure to act to the County Superintendent ripened on July 16, 1993. The legislature recognized the problems created for parents when a school district does not respond to a tuition agreement request in a timely manner. To remedy the situation, the legislature granted a parent a right to appeal his request for tuition to the County Superintendent if the resident district did not make a decision within 15 days of receipt of the request. The County Superintendent would hold a hearing and issue a decision under § 20-3-210, MCA.

In this case, the County Superintendent erred when she did not consider §20-5-322(5), MCA. Failure to consider the Bergs' right to appeal after the expiration of the 15-day period resulted in her erroneous conclusion that Mr. Berg had no way of knowing the status of his request for tuition until he received notice of denial from the Poplar District. Mr. Berg chose not to exercise his right to appeal to the County Superintendent until November 26, 1993. Having chosen to delay exercising his legal right to appeal from July 16, 1993, until November 26, 1993, Berg contributed to the delay of a decision. The order of the County Superintendent requiring the Poplar District to pay out-of-district tuition for the 1993-1994 school term is affected by an error of law and is reversed.

DATED this 21 day of March, 1996.

  
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NANCY KEENAN

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 25<sup>TH</sup> day of March, 1996,  
a true and exact copy of the foregoing Decision and Order was  
mailed, postage prepaid, to the following:

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